IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 30TH NOVEMBER 2007 / 9TH AGRAHAYANA 1929

SA.No. 615 of 1994(F)

AS.155/1988 of ADDL.SUB COURT,PARAVUR
OS.328/1985 of MUNSIFF COURT, PERUMBAVOOR
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APPELLANT: IST RESPONDENT/ IST DEFENDANT

GOPALAN, S/O.KUNJITTY, KOTTAMALY,
RESIDING AT ALLAPRADAGATH,
VENGOLA KARA, DO. PAKUTHY,
KUNNATHUNAD TALUK.

BY ADV. SRI.P.R.VENKETESH

RESPONDENT/ APPELLANT/ PLAINTIFF

UNDYA, S/O. KUNJITTY, KOTTAMALY,
RESIDING AT ALLAPRADAGATH,
VENGOLA KARA, DO. PAKUTHY,
KUNNATHUNAD TALUK. (DIED)

SOLE RESPONDENT DIED. LRS IMPLEADED AS ADDL.RESPONDENTS 2 TO 6 .

2. PADMANABHAN S/O. UNDYA KOTTAMALY,
KANICHAYIL ALLAPRA P.O. PERUMBAVOOR,

3. RAGHAVAN, DO. DO.

4. VASU, DO. DO.

5. DEVAKI, D/O. UNDYA PULIYAM PULLIYOLAMBHAGATH,
KEEZHILLOMKARA, RAYAMANGALAM.

6. RAJAN, S/O. UNDYA, KOTTAMALY KANICHAYIL P.O., ALLAPRA, PERUMBAVOOR.

LEGAL REPRESENTATIVES OF THE DECEASED SOLE RESPONDENT ARE IMPLEADED AS ADDL.RESPONDENTS 2 TO 6 AS PER ORDER DT. 30.11.98 ON CMP. 1563/96.

BY ADV. SRI.S.V.BALAKRISHNA IYER (SR.)
SRI.K.JAYAKUMAR
SMT.M.M.TEENA
SRI.P.B.KRISHNAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 30/11/2007 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

S.A. NO.615/1994

ORDER ON CMP. NO.1253/1994 IN SA. 615/1994

DISMISSED

30.11.2007 **SD/- M.SASIDHARAN NAMBIAR,JUDGE**

/TRUE COPY/

P.S. TO JUDGE

tss

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 615 OF 1994

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Dated this the 30th day of November, 2007

JUDGMENT

First defendant in O.S.328/1985 on the file of Munsiff Court, Perumbavoor is the appellant. Respondent is the plaintiff. The other defendants were not made parties to the appeal. Respondent is admittedly the owner in possession of plaint A schedule property having an extent of 73 ½ cents in survey No.618/1C. Plaint B schedule property was purchased by the father of respondent as per document No.1688/1110 M.E. According to respondent, plaint B schedule property has been used as a way to reach plaint A schedule property and appellant or other defendants have no right to cause any obstruction to it and plaint B schedule property is having a width of 10 feet and length of 90 feet and it starts from the northern panchayat road and runs along the western boundary of appellant's property comprised in survey No.618/1

and it reaches plaint A schedule property. Appellant had originally filed O.S.561/1984 claiming a decree for permanent prohibitory injunction in respect of plaint B schedule property contending that respondent is attempting to trespass into plaint B schedule property by widening the way. That suit was dismissed. Contending that appellant reduced a portion of plaint B schedule way into their possession by encroaching upon a width of 6 ½ feet on the entire length of the property of the appellant, suit was filed seeking a decree for a declaration of title and possession to plaint A and B schedule properties and for a mandatory injunction directing appellant and other defendants to restore portion of plaint A schedule property encroached upon by them to its original position or in the alternative to permit respondent to restore the same to its original position at the expense of the defendant. Appellant resisted the suit contending that he is having 35 ½ cents of land in survey No.618/1C/1 and

78 cents in survey No.618/1C/2 and the disputed pathway is on the west of his property having a width of one kole and respondent requested appellant to give some more land to widen the pathway which was not agreeable to the appellant and respondent attempted to demolish the western compound wall and compelled appellant to institute O.S.561/1984 and appellant did not reduce the width of the way by constructing a compound wall and therefore respondent is not entitled to the decree sought for.

2. Learned Munsiff on the evidence of Pws.1 to 3 DW1, Exts.A1 to A7, Ext.B1 and Exts.C1 to C1(b) found that respondent has right of way over plaint B schedule property. But relying on Ext.C1 (a) plan, it was found tht the way is having a width of only 6 feet on the north and 3 feet and 5 inches on the southern end and 3 ½ feet on the middle and granted a decree to that limited extent declaring title of respondent over plaint A schedule property and over the said extent of

plaint B schedule property. Respondent challenged the judgment before Additional Sub Court, North Paravur in A.S.155/1988. Learned Sub Judge on reappreciation of evidence found that Ext.A6 resurvey plan was not relied on by the trial court as it was not final and subsequently as evidenced by Ext.A7 objections raised by appellant was repelled and Ext.A6 plan was finalised. First appellate court received Ext.A9 plan and Ext.A8 advertisement of the Board of Revenue as additional evidence. Relying on Exts.A6 and A9 it was found that the eastern boundary of plaint B schedule way is a straight line. Learned Sub Judge also found that resurvey plan was prepared in 1970 at an undisputed point of time and it establishes that the eastern boundary of plaint B schedule way was a straight line and Ext.C4(a) plan prepared by the Commissioner in O.S.561/1984, the earlier suit for injunction filed by appellant, and Ext.C1(a) plan prepared by the Commissioner in the present suit establish that the existing way is not a straight

line on the eastern side and accepting the evidence of respondent and witnesses found that reduction of the width of way was caused by encroachment of plaint B schedule way by appellant annexing portion of that property to his remaining property which lies to the east of plaint B schedule property. Learned Sub Judge on the evidence of PW3 found that a vehicle was taken from the northern Panchayat road to the plaint A schedule property by PW3 and existence of the tire marks noted by the Commissioner establish that the original width of the way was more than what now available and it is only due to the encroachment made by appellant over plaint B schedule property. On these findings, learned Sub Judge modified the decree granting a decree for mandatory injunction directing appellant to demolish the boundary existing in the plaint B schedule property having a width of 2.9 meters as shown in Exts.A6 and A9 and to put up a boundary on the eastern side of the said way. The appeal was allowed to that extent.

It is challenged by first defendant in the second appeal.

3. Second appeal was admitted formulating the following substantial question of law.

> Whether lower appellate court was justified in modifying the decree of the trial court and in granting a decree for mandatory injunction.

On the death of respondent, his legal heirs were impleaded as additional respondents 2 to 6.

4. Learned counsel appearing for appellant and respondent were heard.

5. The argument of the learned counsel appearing for appellant is that first appellate court did not properly appreciate the evidence and should not have relied on Ext.C4(a) plan which was prepared by the Commissioner in the earlier suit, without the examination of the Commissioner. Learned counsel also argued that first appellate court should not have relied on Exts.A6 and A9 resurvey plans and should not have granted a

mandatory injunction based on the width of the way shown in the resurvey plan, when the title deed of appellant do not establish the width of the way. It was further argued that respondent is only entitled to get a decree in respect of the way as found by the Commissioner and marked in Ext.C1(a) plan and the decree of the trial court should not have been modified by first appellate court. Learned counsel appearing for respondent argued that Ext.A6 resurvey plan finalised by Ext.A9 was prepared at an undisputed point of time and it establishes width of the way was 2.9 metres and the eastern boundary of that way is a straight line and first appellate court rightly found that reduction caused to the plaint B schedule way, which lies to the west of the property of the appellant, is only on account of the encroachment of portion of the way by appellant and for valid reasons modified the decree. It was argued that question what was the width of plaint B schedule way and whether there was an encroachment by

appellant are all findings of facts and finding of fact of by the first appellate court is final and exercising powers of this court under section 100 of the Code of Civil Procedure, this court may not interfere with the said findings.

6. As rightly found by courts below, appellant is not disputing the right and title of respondent to plaint A schedule property or plaint B schedule way. The dispute is only with regard to the width of the way. Trial court found that width of the way is as found by Commissioner in Ext.C1(a) plan and granted a decree to that extent. First appellate court on reappreciating the evidence found that width of the way as found by Commissioner and marked in Ext.C1(a) plan is the width now existing and the width was reduced and the reduction was caused by encroachment of a portion of plaint B schedule property by appellant. Learned Sub Judge has given valid and sufficient reasons to interfere with the finding of fact by the trial court. Firstly it was found that Ext.A6

draft survey plan was finalised under Ext.A9 resurvey plan and Ext.A6 was prepared in 1970 at a time when there was no dispute with regard to the width of the way. As per Ext.A6 and A9, width of the way shown by the surveyor at an undisputed point of time was 2.9 metres. First appellate court relying on the resurvey plan found the width of the way was 2.9 meters. Added to this, first appellate court found that as per the resurvey plan the eastern boundary of the way is a straight line, which is not the case with the way as found by the Commissioner in Ext.C1(a) plan as well as by previous Commissioner in Ext.A4 plan. It was also found that O.S.561/1984, the previous suit was filed by appellant seeking a decree for injunction alleging that respondent was attempting to widen the way. That suit was dismissed as it was found that before the institution of the suit existing way was encroached upon by appellant. First appellate court on the evidence found that the reduction of the width of the way and the

consequential change of the eastern boundary of the way was caused by the act of the appellant in trespassing into a portion of plaint B schedule way and adding it to his property. Apart from this evidence, first appellate court also relied on the evidence of PW3, the driver who deposed that he had taken vehicle to the plaint A schedule property through plaint B schedule way. It was found that if the way was not having the width of 2.9 metres and instead was only having the width as found by the Commissioner in Ext.C1(a), it would not have been possible. It is for all these reasons, first appellate court modified the decree. This finding of fact by the first appellate court is based on the evidence on record. That finding of fact by first appellate court is final. Exercising the powers of this court under section 100 of Code of Civil Procedure, it is not possible to reappreciate the evidence and substitute the findings of first appellate court.Even if evidence is to be reappreciated, on the evidence on record, no other

conclusion could be arrived at. In such circumstance, appeal fails and is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006